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MALAYAN BANKING BHD

v.

UNITED CARTEL SDN BHD

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-351-2004]
2 JUNE 2006

C ***LAND LAW:*** *Charge - Order for sale - Application for - National Land Code, s. 256 - Whether application misconceived - Right to possession - Whether plaintiff failed to show circumstances - Rules of the High Court 1980, O. 83 r. 3(3) - Whether complied with - Whether plaintiff's total claim erroneous - Statutory notice - Form 16D - Whether defendant has*
D *challenged or disputed indebtedness stated in statutory notice - Whether plaintiff entitled to penalty interest - Contracts Act 1950, s. 75 - Notice to remedy breach within seven days - Whether in complete compliance with s. 254(1)(b) National Land Code - Whether defendant established any cause to the contrary*

E

This was the plaintiff's application by way of originating summons in encl. 1 pursuant to s. 256 of the National Land Code ('NLC') seeking an order for sale of two pieces of land (collectively 'the land'). The facts were that the plaintiff offered to the defendant
F banking facilities in the sum of RM1 million. The said facilities were accepted by the defendant and secured by way of first and second legal charges. *Vide* another letter, the plaintiff offered to the defendant further overdraft facility in the sum of RM1 million which was also accepted by the defendant and secured by way of
G a third legal charge. The defendant defaulted in the repayments and was in breach of the terms and conditions of the above charges. It was the defendant's submissions that (1) the plaintiff's application was misconceived as the total claim was wrong and the type of loan was not specified; (2) the plaintiff has failed to show
H the circumstances under which the plaintiff has the right to possession; (3) in relation to the term loan, the plaintiff's total claim was erroneous (4) that the plaintiff has varied the rate of interest in Form 16D ('the statutory notice') and that on the basis of s. 75 of the Contracts Act 1950, the penalty interest imposed
I by the plaintiff was not valid; (5) the statutory notice has given the defendant only seven days to remedy the breach when s. 254(1)(b) of the NLC provides for a period of one month.

Held:

(1) A perusal of the plaintiff's originating summons revealed that the plaintiff's claim against the defendant has been clearly specified, seeking an order that the land be sold by way of private treaty and/or public auction to recover RM244,420.18 being the term loan facility and RM1,838,996.63 being overdraft facilities. The submission presented for the defendant was devoid of any merit and could not be sustained. (paras 13 & 14)

(2) The plaintiff has complied with O. 83 r. 3(3)(a) to (d) of the Rules of the High Court (RHC) which obviously showed the circumstances giving rise to the plaintiff's right to possession thereunder. Although O. 83 r. 3(6) RHC regulates a claim by the plaintiff for payment of moneys secured by the charge and O. 83 r. 3(3) RHC provides for delivery of possession, nevertheless the statutory particulars required to be shown under O. 83 r. 3(3) RHC would apply to O. 83 r. 3(6) RHC. As the plaintiff herein has provided all the statutory particulars, this court was constrained to reject the defendant's contention. (paras 25, 27 & 28)

(3) The monthly statements of account on the term loan had been sent by the plaintiff to the defendant on a regular basis. If at all there have been repayments by the defendant which had really been omitted in the monthly statements of account, the defendant would no doubt have raised it with the plaintiff at the earliest opportunity as such repayments, if any, were within the specific knowledge of the defendant. It was for the defendant as chargor to demonstrate cause to the contrary. However, the defendant failed to do so. (para 31)

(4) The statutory notice spelt out the outstanding sums due and payable by the defendants to the plaintiff. Prior to this originating summons the defendant has never challenged or disputed the indebtedness stated in the statutory notice. In the absence of dispute by the defendant at the first opportunity and in the absence of any manifest error, the content of the statutory notice shall be deemed to be conclusive. (para 34, 35 & 38)

(4a) Applying the provisions of s. 75 of the Contracts Act 1950, the plaintiff, being the party complaining of the breach by the defendant, was entitled as of right to receive from the defendant the penalty interest stipulated therein, whether or not the plaintiff has proved actual damage or loss. (para 41)

(5) The seven-day time frame stated in the statutory notice was in complete compliance with the words 'such alternative period as may be specified in the charge' contained in s. 254(1)(b) of the NLC. Hence, on the foregoing grounds, the defendant has not established any cause to the contrary. (paras 52 & 54)

[Order accordingly.]

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Bank Pertanian Malaysia v. Zainal Abidin Kassim [1995] 2 MLJ 537 ***(refd)***

Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 FC ***(refd)***

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144 HC ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Mohamad Khalid Farzalur Rahaman & Anor v. Citibank Bhd & Anor [2000] 2 CLJ 797 HC ***(refd)***

Murugappa Chettiar v. Letchumanan Chettiar [1939] MLJ 296 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Perwira Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd [1997] 5 MLJ 185 ***(refd)***

Public Bank Bhd v. Lee Kin Mio & Anor [2006] 1 CLJ 630 HC ***(refd)***

Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd [1986] 2 MLJ 253 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75
National Land Code, ss. 254(1)(b), 256(3)
Rules of the High Court 1980, O. 83 r. 3(3)(a), (6)

For the plaintiff - Nurul Huda; M/s Othman Hashim & Co
For the defendant - AB Ng; M/s AB Ng & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

[1] This is the plaintiff's application by way of originating summons in encl. (1) pursuant to s. 256 of the National Land Code 1965 seeking an order for sale of two pieces of land held respectively under Pajakan Negeri No. 9441, Lot No. 6836; and Pajakan Negeri 9440 Lot 6837, both in the mukim of Batu Berendam, Melaka (collectively "the land").

[2] A reference hereinafter to a section is a reference to that section in the National Land Code 1965 unless otherwise stated.

Factual Background

[3] This does not appear to be disputed.

[4] *Vide* letter dated 12 July 1999, the plaintiff offered to the defendant banking facilities in the sum of RM1 million, of which RM350,000 was by way of term loan at the agreed interest of 2.5% p.a. above the base lending rate, with a monthly instalment of RM5,198 repayable over 84 months, the final payment being on or before 31 December 2005, and with a penalty interest of 1% p.a., while the other component of RM650,000 was by way of overdraft and letters of credit, bankers acceptance with various rates of interest stated therein (collectively "overdraft facility").

[5] The said banking facilities were accepted by the defendant and secured by way of first and second legal charges *vide* presentations No. 8191/99 Jilid 654, Folio 86 and No. 8192/99 Jilid 654 Folio 87 respectively.

[6] *Vide* another letter dated 30 December 2000, the plaintiff offered to the defendant further overdraft facility in the sum of RM1 million with the conditions stated therein and which the defendant had accepted. It was secured by way of a third legal charge *vide* presentation No. 2276/01 Jilid 714 Folio 86.

[7] The defendant has defaulted in the repayments and had been in breach of the terms and conditions of the above three charges.

A **Governing Principles**

[8] The parties herein share the common ground that in the instant application, s. 256(3) applies and that the court shall order the sale of the land to which the charge relates "unless it is B satisfied of the existence of cause to the contrary".

[9] Gopal Sri Ram JCA speaking for the Federal Court followed *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296 HC; and *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC and elaborated C that the burden is on the chargor to show "cause to the contrary" within s. 256(3), which may be established only in three categories of cases *viz*:

(1) any of the exceptions to the indefeasibility doctrine in s. 340; D

(2) the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(3) the grant of an order for sale would be contrary to some rule of law or equity. E

[10] Defendants relied on categories (2) or (3) above, and raised several issues which I shall now consider.

Loans Not Correctly Specified

F **[11]** Defendant's learned counsel Mr. AB Ng submitted that the plaintiff's application was misconceived as the total claim was wrong and the type of loan was not specified.

[12] Learned counsel Miss Nurul Huda contended for the plaintiff G that the plaintiff's claim and type of loan has been clearly specified in accordance with the rules.

[13] My perusal of the plaintiff's originating summons reveals that the plaintiff's claim against the defendant has been clearly H specified, seeking an order that the land be sold by way of private treaty and/or public auction to recover:

(1) RM244,420.18 being the term loan facility as at 15 July 2004 together with interest at 6.5% p.a. together with penalty interest of 1% p.a. on all arrears calculated from 16 July 2004 I until realisation; and

(2) RM1,838,996.63 being overdraft facilities as at 15 July 2004 together with interest at 2% p.a. above the base lending rate together with penalty interest at 1% p.a. calculated from 16 July 2004 until realisation.

[14] With the utmost respect, I find that the submission presented for the defendant is devoid of any merit and cannot be sustained.

Right To Possession

[15] It was argued for the defendant that the plaintiff has failed to show the circumstances under which the plaintiff has the right to possession. Reference was made to O. 83 r. 3(3) and *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim* [1995] 2 MLJ 537 HC.

[16] The plaintiff's response was that O. 83 r. 3(3) has been complied with.

[17] Order 83 r. 3(3) merits reproduction as follows:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:
>
> (a) the amount of the advance;
>
> (b) the amount of the repayments;
>
> (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) the amount remaining due under the charge.

In my judgment, it is to be noted that the plaintiff's originating summons has made it absolutely clear that one of the orders sought by the plaintiff is that the defendant do deliver possession of the land to the plaintiff.

[18] The particulars required under O. 83 r. 3(3)(a) to (d) ("the statutory particulars") have been set out in para 11 of the plaintiff's first affidavit in support affirmed on 16 August 2004 specifying the state of the account between the defendant as chargor and the plaintiff as chargee.

[19] Paragraph 2 of the plaintiff's second affidavit and para 13 of the plaintiff's third affidavit respectively contain all the statutory particulars, updating the state of the account between the parties herein.

[20] Paragraph 6 of the plaintiff's fourth affidavit provides all the updated statutory particulars for the term loan and the overdraft facilities.

[21] Paragraph 8 of the defendant's affidavit in reply merely denied para 11 of the plaintiff's first affidavit and alleged that the plaintiff's claim was wrong, misleading, excessive and unreasonable. It was a bare denial without condescending upon particulars.

[22] There was no affidavit by the defendant to reply to para 2 of the plaintiff's second affidavit and so these statutory particulars are deemed to have been admitted by the defendant: see eg, *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 and *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.

[23] In response to para 13 of the plaintiff's third affidavit, para 6 of the defendant's affidavit contained another bare denial which merely averred that the particulars were incomplete.

[24] I am unable to find any affidavit in reply to the plaintiff's fourth affidavit and so, as in the plaintiff's second affidavit above, the updated statutory particulars are likewise deemed to have been admitted by the defendant.

[25] In my judgment, there can be no two views that the plaintiff has complied with O. 83 r. 3(3)(a) to (d) which obviously show the circumstances giving rise to the plaintiff's right to possession thereunder.

[26] Where eg, the plaintiff stated only the amount of interest and the total amount outstanding under the charge, but has failed to provide the other statutory particulars *viz* the amount of repayments and instalments in arrear under O. 83 r. 3(6) as in *Zainal Abidin bin Kassim, supra,* Hishamudin J dismissed the plaintiff's application on the ground of serious omissions.

[27] It is to be noted that although O. 83 r. 3(6) regulates a claim by the plaintiff for payment of moneys secured by the charge and O. 83 r. 3(3) provides for delivery of possession, nevertheless the statutory particulars required to be shown under O. 83 r. 3(3) would apply to O. 83 r. 3(6).

[28] As the plaintiff herein has provided all the statutory particulars, I am constrained to reject the defendant's contention.

Erroneous Claim

[29] The defendant took the position that in relation to the term loan, the plaintiff's total claim was erroneous as the plaintiff's affidavits show as follows:

Date of affidavit	Defendant's repayment (RM)
16 August 2004	188,330.10 as at 15 July 2004
28 October 2005	117,934.10 as at 9 November 2005
7 December 2005	177,934.10 as at 9 December 2005

[30] The plaintiff's contention was that the state of the account between the parties herein has to be updated from time to time, as shown in the latest affidavit, and that if the plaintiff's total claim had really been erroneous, the defendant would surely have been able to state the exact amount of the defendant's repayments, if any, but the defendant has failed to do so.

[31] In my judgment, it needs to be noted that the monthly statements of account on the term loan had in fact been sent by the plaintiff to the defendant on a regular basis. If at all there have been repayments by the defendant which had really been omitted in the monthly statements of account, the defendant would no doubt have raised it with the plaintiff at the earliest opportunity as such repayments, if any, are within the specific knowledge of the defendant. As stated in *Low Lee Lian, supra,* it is for the defendant as chargor to demonstrate cause to the contrary. However, the defendant has failed to do so.

A **Excessive Interest**

[32] The next issue raised for the defendant is that the plaintiff has varied the rate of interest in Form 16D ("the statutory notice") and that on the basis of s. 75 of the Contracts Act
B 1950, the penalty interest imposed by the plaintiff was not valid, referring to:

(1) *Co-operative Central Bank Ltd. (In receivership) v. Meng Kuang Properties Bhd* [1991] 2 CLJ 1144 HC; and

C (2) *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v. WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185 HC.

[33] It was contended for the plaintiff that the interest stated in
D the statutory notice was correct. Support was sought in *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd* [1986] 2 MLJ 253 PC.

[34] In my judgment, it is necessary to closely examine the
E statutory notice. I find that it has spelt out the outstanding sums due and payable by the defendants to the plaintiff as at 22 April 2004 *viz* RM 239,589.89 under the term loan with interest at 6.5% p.a. and penalty interest at 1% p.a. on the outstanding sum from 23 April 2004 until realisation; and RM1,791,842.44 under
F the overdraft facilities together with interest at 2% p.a. above the base lending rate, and penalty interest at 1% p.a. on the outstanding sum until realisation, together with the costs of proceedings.

[35] It is also pertinent to point out that prior to this originating
G summons, the defendant has never challenged or disputed the indebtedness stated in the statutory notice.

[36] Clause 24.1 of the facility agreement executed between the plaintiff as the lender and the defendant as the borrower reads:

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24.1 Evidence of Indebtedness

In any proceedings relating to this Agreement a statement as to any amount due to the Lender under this Agreement which is certified as being correct by an officer of the Lender shall, unless
I oherwise provided in this Agreement, save for manifest error, be conclusive evidence that such amount is in fact due and payable.

[37] Clause 67 of the annexure to the first charge, cl. 76 of the annexure to the second and third charges respectively contain a corresponding provision as in cl. 24.1 of the facility agreement.

[38] In the circumstances, in the absence of dispute by the defendant at the first opportunity and in the absence of any manifest error, I am of the view that the content of the statutory notice shall be deemed to be conclusive: see *Citibank N.A. v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282 FC; and *Public Bank Bhd v. Lee Kin Mio & Anor* [2006] 1 CLJ 630 HC.

[39] Section 75 of the Contracts Act 1950 relied on by the defendant reads:

> **Compensation for breach of contract where penalty stipulated for**
>
> 75. Where a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of a penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[40] In the instant case, cl. 17.4 of the facility agreement provides for the default penalty interest of 1% p.a., while cl. 63 of the annexure to the first charge and cl. 64 of the annexure to the second and third charges respectively contain a corresponding provision for default penalty interest of 1% p.a.

[41] Applying the provisions of s. 75 of the Contracts Act 1950 to the above clauses in this case, the plaintiff, being the party complaining of the breach by the defendant, is entitled as of right to receive from the defendant the penalty interest stipulated therein, whether or not the plaintiff has proved actual damage or loss.

[42] I am unable to find any authority to support the defendant's contention that the penalty interest is invalid in law.

[43] The authorities cited for the defendants need to be analysed now.

[44] The facts in *Meng Kuang Properties, supra*, reveal that in the charge action, the chargee bank had *vide* Form 16D demanded the sum comprising, *inter alia*, a default interest at the rate of 20% p.a. and there was nothing to show that the chargee has given the requisite notice as required under cl. 5 of the chargee annexure there. Hence, Lim Beng Choon J (as he then was) held that the plaintiff was not *prima facie* entitled to an order for sale.

[45] In *WR Low & Ng Realty, supra*, the chargee had imposed a penalty interest when there was no provision in the charge instrument. Zainun Ali JC (now J) dismissed the chargee's foreclosure proceedings.

[46] The facts in the above two authorities are readily distinguishable from those before me and so are unhelpful to the defendant.

Time Frame To Remedy Breach

[47] It was argued for the defendant that the statutory notice has given the defendant only seven days to remedy the breach when s. 254(1)(b) provides for a period of one month, relying on *Mohamad Khalid bin Farzalur Rahaman & Anor v. Citibank Bhd & Anor* [2000] 2 CLJ 797 HC.

[48] The plaintiff's contention is that the judgment in *Mohamad Khalid, supra*, has been overruled by the Court of Appeal in *Citibank Bhd v. Mohamad Khalid bin Farzalur Rahaman & Ors.* [2000] 3 CLJ 739.

[49] In my judgment, it is to be noted that there was no dispute that the statutory notice served on the defendant has given the defendant seven days to remedy the breach. The question before me is whether the plaintiff in giving the seven-day statutory notice has complied with s. 254(1) and para (b) thereof ("s. 254(1)(b)").

[50] The provisions regulating service of the statutory notice are contained in s. 254(1)(b) which reads:

> **254 Service of default notice, and effect thereof**
>
> (1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or **such alternative period as may be specified in the charge,** the chargee may serve on the chargor a notice in Form 16D:

(a) ...;

(b) requiring it to be remedied within one month of the date on which the notice is served, or **such alternative period as may be specified in the charge;** and

(c) ... (emphasis added)

[51] Clause 29 of the first charge annexure provides that in the event of any breach by the defendant, as chargor, of the agreement to pay the sum due to the plaintiff as chargee for a period of not less than seven days, it shall be lawful for the chargee to give the statutory notice to the chargor to remedy the breach within a period of not less than seven days. Clause 31 of the other two charge annexures respectively contain corresponding provisions.

[52] In my judgment, it is plain and obvious that the seven-day time frame stated in the statutory notice is in complete compliance with the words "such alternative period as may be specified in the charge" contained in s. 254(1)(b).

[53] While it is true that in *Mohamad Khalid, supra,* cited for the defendant, Kamalanathan Ratnam J (as he then was) held that the period of breach referred to in s. 254(1) should be at least one month, on appeal therefrom the Court of Appeal speaking through Gopal Sri Ram JCA in *Citibank Bhd, supra,* specifically held that the aforesaid words in s. 254(1) enable a chargee to impose a period of less than one month and permit a chargor to accept a statutory notice of less than one month. I am bound by the Court of Appeal judgment. Hence, I hold that the defendant's reliance on the High Court judgment is devoid of merits.

Conclusion

[54] On the foregoing grounds, I hold that the defendant has not established any cause to the contrary. I therefore make an order for sale in terms of encl. (1) to realise the sum of RM2,445,735.13 outstanding on 2 June 2006 and fix the auction for 4 October 2006.